Supreme Court, U.S.
FILED

03 929 DEC 22 2003

No. _____

In the
Supreme Court of the United States

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

QUESTION PRESENTED

Did the Sixth Circuit err in holding that the Clean Water Act authorizes a criminal conviction of a property owner for placing sand in isolated wetlands that do not abut a body of open water but lie approximately twenty miles from the nearest navigable waterway?

RULE 29.6 STATEMENT

John A. Rapanos appears as an individual with no corporate affiliations.

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PETITION FOR WRIT OF CERTIORARI

John A. Rapanos respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 339 F.3d 447 (6th Cir. 2003), Appendix (App.) A. The opinion of the district court is reported at 190 F. Supp. 2d 1011 (E.D. Mich. 2002), App. B.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on August 5, 2003. That court's denial of the Petition for Rehearing En Banc was entered on September 29, 2003, App. D. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The United States Constitution provides that Congress has power "[t]o regulate commerce . . . among the several states." Art. I, § 8, cl. 3.

The Clean Water Act (CWA) provides in pertinent part:

> Except as in compliance with this section and section[] . . . 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

33 U.S.C. § 1311(a) (CWA § 301(a)).

> The Secretary may issue permits, after notice and opportunity for public hearings for the discharge of dredged or fill material into the navigable waters at specified disposal sites.

33 U.S.C. § 1344(a) (CWA § 404(a))

> (5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.
>
> (6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water . . . .
>
> (7) The term "navigable waters" means the waters of the United States, including the territorial seas.

33 U.S.C. § 1362(5-7) (CWA § 502(5-7)).

STATEMENT OF THE CASE

In the context of a criminal conviction, this case presents a stark example of the real world danger suggested by this Court in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001), if the Army Corps of Engineers (Corps) and the Environmental Protection Agency (EPA) are given broad jurisdiction under the Clean Water Act to regulate wetland property located many miles from navigable waters. The Sixth Circuit has expanded federal CWA jurisdiction to include the "whole tributary system of any navigable waterway" including man-made drainage

ditches and isolated wetlands. Thus, the decision below criminalizes conduct that this Court has determined is beyond the reach of the Clean Water Act, as intended by Congress and constrained by the commerce power and fundamental principles of federalism.

For placing sand without a federal permit in nonnavigable, isolated,[1] intrastate wetlands on his property, John A. Rapanos was tried and convicted of violating the Clean Water Act, fined $185,000 and sentenced to three years probation. On appeal, the Sixth Circuit directed the trial court to increase the sentence to include a minimum of ten months in prison. But, this Court granted a writ of certiorari, vacated the conviction and remanded the case back to the Sixth Circuit for a determination consistent with *Solid Waste Agency* in which this Court determined that "isolated" wetlands, or wetlands not adjacent to navigable waters, were not subject to federal jurisdiction under the Clean Water Act.

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[1] The district court characterized the wetlands on Mr. Rapanos' property as "isolated" based on the following analysis:

> It is worth noting that the majority opinion in *Solid Waste Agency* repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hydrologically connected, as well as ecologically connected, to navigable waters. *See Solid Waste Agency*, 531 U.S. [159,] 176 n.2, ([(2001)] (Stevens, J., dissenting). The dissent notes that the wetlands in *Solid Waste Agency* are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, [Rapanos'] wetlands may be considered "isolated" for purposes of the CWA.

App. B6 n.3.

Contrary to the decision of this Court, and in conflict with the Fifth Circuit, the Sixth Circuit upheld the conviction on remand on the same basis as before. Consequently, this case is brought before this Court on another Petition for Writ of Certiorari presenting the same question on which this Court originally granted certiorari: whether Clean Water Act jurisdiction extends to isolated wetlands not adjacent to any navigable waters. This case also follows on the heels of two other pending petitions raising a similar question. *See Newdunn v. United States* (Docket No. 03-637) and *Deaton v. United States* (Docket No. 03-701). Therefore, this Court should grant the writ and address the merits of this case.

A. Factual and Procedural Background

John A. Rapanos owns a 175-acre parcel of land in Williams Township, Michigan. This parcel includes nonnavigable, isolated, intrastate wetlands that were filled in 1988 or 1989 to enhance the property for sale and development. The parcel contains a man-made drainage ditch known as Labozinski Drain, which eventually empties into Hoppler Creek which flows into the Kawkawlin River and ultimately into Saginaw Bay. App. B7. The nearest body of navigable water to Mr. Rapanos' property is a point in the Kawkawlin River approximately twenty linear miles away. App. B7-B8. Therefore, the wetlands on Mr. Rapanos' property are not directly adjacent to any navigable water.

Mr. Rapanos placed sand in the wetlands on his property without a federal permit. As a result, he was prosecuted by the federal government and convicted in 1995 of two counts of "discharging pollutants into waters of the United States" without a permit in violation of section 301(a) of the Clean Water Act. *See* 33 U.S.C. § 1311(a). The trial court sentenced Mr. Rapanos to three years probation and a fine of $185,000. Mr. Rapanos appealed his conviction on jurisdictional grounds and the government cross-appealed his sentence, asking for ten

month's jail time. The Sixth Circuit dismissed Mr. Rapanos' appeal and remanded the case to the district court for resentencing, whereupon Mr. Rapanos sought a writ of certiorari from this Court. In 2001, this Court granted the writ, vacated the Sixth Circuit determination, and remanded the case to the Court of Appeals with instructions to reconsider the case in light of *Solid Waste Agency*. The Court of Appeals remanded the case back to the district court.

B. The District Court Decision on Remand from This Court

On remand, the government argued that the wetlands on Mr. Rapanos' property were "waters of the United States," and subject to federal regulation, because "the wetlands at issue were "hydrologically connected and 'directly adjacent to navigable waters.'" App. B5-B6. But, the court noted that *no finding of a "hydrological connection"* was ever made by either the jury or the court and that based on the jury instructions the jury might well have found "the wetlands at issue to be completely 'isolated' from any navigable waters." App. B6-B7. The court noted further that in *Solid Waste Agency* "the Supreme Court held that the Army Corps of Engineers lack[ed] the statutory authority to regulate wetlands that are completely isolated from any navigable waters." App. B7.

But even assuming some sort of "surface hydrological connection" between the wetlands and Labozinski Drain, a man-made drainage ditch, as the government argued, the district court found the nearest navigable waters about twenty miles away. On these facts, and what it termed a close review of *Solid Waste Agency* and *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), the court found "as a matter of law, that the wetlands on [Mr. Rapanos'] property were not adjacent to navigable waters" and could not be regulated. App. B8.

The court determined *Solid Waste Agency* provided a mode of analysis that was applicable to this case. The district court expressly recognized that the reason this Court invalidated the "Migratory Bird Rule" in *Solid Waste Agency* was "because the CWA contains the words 'navigable waters,' which act as a limit on federal jurisdiction." App. B11. This is significant, the court concluded, because it showed "what Congress intended as its authority for enacting the CWA: 'its traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made.' " *Id.* (citing *Solid Waste Agency*, 531 U.S. at 172).

C. The Sixth Circuit Decision on Remand from This Court

The Court of Appeals reversed the trial court and reinstated Mr. Rapanos' criminal conviction. The Sixth Circuit ignored the guidance this Court gave in *Solid Waste Agency* and found that, "the *Solid Waste* Court, in a narrow holding," merely, "invalidated the Migratory Bird Rule." App. A10. Instead, the appellate court adopted the Fourth Circuit view in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003), that *Riverside Bayview Homes* can be read broadly to authorize Clean Water Act jurisdiction over the whole tributary system of any waterway and that the Act reaches to the man-made drainage ditch and its "adjacent" wetlands in this case. App. A9-A10.

Without disputing the conclusion of the district court that *no finding of a "hydrological connection"* was ever made between the wetlands on Mr. Rapanos' property and the Labozinski Drain, and that the wetlands were not directly adjacent to any navigable waters, the Court of Appeals simply accepted the government's assertion that such a connection existed. From this "connection," the court concluded that "the Rapanos wetlands are covered by the Clean Water Act." App. A10.

The logic of the Court of Appeals is simple, if faulty: "Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act." *Id.* Thus, the Sixth Circuit adopted the principle rejected by this Court in *Solid Waste Agency*, and the Fifth Circuit, that any "hydrological connection" between a wetland and a navigable waterway is sufficient to establish federal jurisdiction under the Clean Water Act.

REASONS FOR GRANTING THE WRIT

Because this case involves an interpretation of Clean Water Act jurisdiction that exceeds both statutory and constitutional extremes, in the context of a criminal conviction on remand from this Court, this case is uniquely suited to review on the merits.

Section 404(a) of the Clean Water Act regulates the discharge of dredged or fill material into "navigable waters." The lower court has interpreted that provision to cover the filling of nonnavigable, isolated, intrastate, wetlands that are not immediately adjacent to a navigable water. Under the Sixth Circuit decision, any wetland with even a supposed "hydrological connection" to a distant navigable water body—like the wetlands in this case—may be regulated under the Act. But it does not stop there. According to the Sixth Circuit, the government may regulate "the whole tributary system of any navigable waterway," including the man-made drains, ditches, and isolated wetlands in this case.

That decision distorts the plain meaning of "navigable waters" and nullifies the express intent of Congress to limit federal jurisdiction in areas of land and water use in deference to the States. That decision also conflicts with the Fifth Circuit

and this Court's interpretation of the reach of section 404(a) as determined in *Solid Waste Agency*. Moreover, the Sixth Circuit decision raises an important question of whether Congress could exercise such authority consistent with the Commerce Clause; a question this Court avoided in *Solid Waste Agency* by limiting the scope of the Clean Water Act to traditional navigable waters and those wetlands that abut and are inseparably bound up with those waters.

I

THE LOWER COURT DECISION UNDERMINES THIS COURT'S DECISION IN *SOLID WASTE AGENCY* ON A QUESTION OF NATIONAL IMPORTANCE

Although this Court did not determine the exact meaning of "waters of the United States" in *Solid Waste Agency,* this Court did set express limits on the reach of those waters. Under *Solid Waste Agency*, only those wetlands that physically abut traditional navigable waters, and are inseparably bound up with those waters, are subject to federal jurisdiction.

Until *Solid Waste Agency* was decided, many courts and federal officials relied on *Riverside Bayview Homes* to justify EPA and Corps regulation of all wetlands without regard to their adjacency to "navigable waters." Even now, these agencies and many lower courts, including the Fourth Circuit in *Newdunn* (Docket No. 03-637) and *Deaton* (Docket No. 03-701), and the Sixth Circuit in this case, doggedly assert that *Solid Waste Agency* has not altered federal wetland jurisdiction beyond invalidation of the "Migratory Bird Rule."

Riverside Bayview Homes, Inc., owned 80 acres of lowlying marshland near the shores of Lake St. Clair in Macomb County, Michigan. When Riverside Bayview Homes placed fill material on the property without a permit, the Corps

asserted jurisdiction over the property as an "adjacent wetland" and obtained an injunction from the district court. The district court found that the marshland was adjacent to a navigable water because the area was characterized by saturated soil conditions and wetland vegetation that "extended . . . to Black Creek, a navigable waterway." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. at 131.

That physical side-by-side connection between the marshland and the open body of water formed the basis for this Court's decision in *Riverside Bayview Homes*. This Court expressly held that Riverside Bayview Homes must obtain a Section 404(a) permit "[b]ecause respondent's property is part of a wetland that *actually* abuts on a navigable waterway." *Id.* at 135 (emphasis added). But notwithstanding this clear holding, other language in *Riverside Bayview Homes* was interpreted by the EPA and the Corps to extend the reach of the Clean Water Act to nonnavigable waters generally, as was the case here. *See* App. A8-A10.

As this Court noted: "In *Riverside Bayview Homes* we recognized that Congress intended the phrase 'navigable waters' to include 'at least some waters that would not be deemed "navigable" under the classical understanding of that term.'" *Solid Waste Agency*, 531 U.S. at 171 (quoting *Riverside Bayview Homes*, 474 U.S. at 133). The EPA and the Corps (not to mention the courts) used that language to justify regulation of even wholly isolated waters. But in *Solid Waste Agency*, this Court rejected that interpretation by noting that the language of *Riverside Bayview Homes* did not confer federal jurisdiction over all nonnavigable wetlands. "We cannot agree," this Court stated, "that Congress' separate definitional use of the phrase 'waters of the United States' constitutes a basis for reading the term 'navigable waters' out of the statute," as the agencies and lower courts had done. *Id.* at 172. Although this Court said in *Riverside Bayview Homes* that the word "navigable" had "limited effect," this Court stated in *Solid Waste Agency* that "it

is one thing to give a word limited effect and quite another to give it no effect whatever." *Id.* This Court concluded, therefore, that

> [t]he term "navigable" has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made.

Id. at 172.

This language set forth the scope of the Clean Water Act and clarified *Riverside Bayview Homes*, an observation missed by the Sixth Circuit below. Although this Court had held in *Riverside Bayview Homes* that the term "navigable" was of limited effect, in *Solid Waste Agency* this Court declared the limits of that effect: "In *United States v. Riverside Bayview Homes, Inc.*, we held that the Corps had § 404(a) jurisdiction over wetlands that *actually abutted* on a navigable waterway." *Id.* at 167 (emphasis added; citations omitted).

But this Court did not stop there in its explication of *Riverside Bayview Homes*. This Court offered additional clarification of that decision and the scope of agency jurisdiction over wetlands. This Court stated: "But our holding was based in large measure upon Congress' unequivocal acquiescence to, and approval of, the Corps' regulations interpreting the CWA to cover wetlands *adjacent* to navigable waters." *Id.* (emphasis added). And further, "[w]e found that Congress' concern for the protection of water quality and aquatic ecosystems indicated its intent to regulate wetlands '*inseparably bound up* with the "waters" of the United States.'" *Id.* (emphasis added) (quoting *Riverside Bayview Homes*, 474 U.S. at 134). Thus, "[i]t was the *significant nexus* between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*." *Id.* (emphasis added).

This Court defined jurisdictional wetlands in *Riverside Bayview Homes*, therefore, as those wetlands "that actually abutted on a navigable waterway" *and* were "inseparably bound up with the 'waters of the United States.'" These two factors comprised the "significant nexus" which informed this Court's reading of the Clean Water Act and constituted the basis for federal regulation of adjacent wetlands.

After discussing what this Court *had* determined in *Riverside Bayview Homes*—that the Corps could regulate certain wetlands that *abut* a "navigable waterway"—this Court pointed out what it *had not* determined in that case: "Indeed, we did not 'express any opinion' on the 'question of the authority of the Corps to regulate discharges of fill material into wetlands that are *not adjacent* to bodies of open water . . . .'" *Id.* at 167 (emphasis added).

It follows from that statement that *Riverside Bayview Homes* (on which the Sixth Circuit relied in this case) does not, and could not, provide a legal basis for the decision below upholding a criminal conviction for violating federal regulation of wetlands that lie close to twenty miles from the nearest navigable waters. Moreover, in *Solid Waste Agency* this Court addressed the very question left open in *Riverside Bayview Homes* and concluded:

> In order to rule for respondents here, we would have to hold that the jurisdiction of the Corps extends to ponds that are *not* adjacent to open water. But we conclude that the text of the statute will not allow this.

Id. at 168.

This conclusion is not dicta that can be ignored as unnecessary to the decision, although the Sixth Circuit did so below. Rather, it formed the basis on which this Court invalidated the "Migratory Bird Rule" and declined the

government's invitation to hold that "isolated ponds, some only seasonal . . . fall under § 404(a)'s definition of 'navigable waters.'" *See id.* at 171.

The Sixth Circuit misapplied the statutory test for determining jurisdictional wetlands under the Clean Water Act. Rather than limit federal regulation to wetlands that actually abut navigable waters, and are inseparably bound up with those waters, as this Court requires under *Riverside Bayview Homes* and *Solid Waste Agency*, the Sixth Circuit extended federal authority to the isolated wetlands on Mr. Rapanos' property. Indeed, the district court found that *no "hydrological connection" was ever established* between the wetlands and the nearest navigable waterbody miles away.[2]

II

CONGRESS DID NOT INTEND THE BROAD READING OF THE CLEAN WATER ACT ADOPTED BY THE SIXTH CIRCUIT IN THIS CASE

The Sixth Circuit's expansive reading of the Clean Water Act to allow federal jurisdiction over the entire tributary system of any waterway, including the isolated wetlands in this case, is based on a faulty premise. In the appellate court's view,

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[2] App. B6-B8. Although the district court found that a new trial was not in order to determine the exact connection between the wetlands on Mr. Rapanos' property and navigable waters, this was based on the court's determination as a matter of law that the wetlands on Mr. Rapanos' property were not adjacent to navigable waters and could not be regulated. App. B8. If, however, this Court determines that any "hydrological connection" is sufficient to establish § 404(a) jurisdiction under the Clean Water Act, Mr. Rapanos should have the right of a new trial to determine the nature of that connection, if any at all.

"common sense makes clear" that the Clean Water Act cannot "purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants." App. A6. But this argument misses the point. Whatever the Sixth Circuit believes "common sense makes clear," Congress itself chose to limit CWA jurisdiction to traditional navigable waters. This Court makes clear that Congress did not intend the broad reading of the Act adopted by the Sixth Circuit:

> Respondents refer us to portions of the legislative history that they believe indicate Congress' intent to expand the definition of "navigable waters." Although the conference Report includes the statement that the conferees "intend that the term 'navigable waters' be given the broadest possible constitutional interpretation," S. Conf. Rep. No. 92-1236, p. 144 (1972), neither this, nor anything else in the legislative history to which respondents point, signifies that Congress intended to exert anything more than its commerce power over navigation . . . .

Solid Waste Agency, 531 U.S. at 168 n.3.

Moreover, this Court explained its often misunderstood statement in *Riverside Bayview Homes* that the word "navigable waters" in the statute was of "limited effect." *Id.* at 172. "[I]t is one thing," this Court said, "to give a word limited effect and quite another to give it no effect whatever." *Id.* This Court concluded, therefore, that the term "navigable waters" in the Clean Water Act shows "us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or have been navigable in fact or which could reasonably be so made." *Id.*

The decision of Congress to limit the scope of the Clean Water Act to "navigable waters" is not contrary to "common sense." Rather, it makes perfect sense. Congress understood

that it was constrained by the limits of the commerce power and the principles of federalism, so it deferred to the States to regulate nonnavigable waters.

Although Congress passed the CWA to protect the integrity of the Nations' waters, this Court found: "In so doing, Congress chose to 'recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .'" *Id.* at 166-67.

Contrary to the claims of the Sixth Circuit that Congress can only protect "navigable waters" by "policing" nonnavigable waters, like the isolated wetlands in this case, the government can enforce § 404(a) against anyone who actually discharges a pollutant to a "navigable water" without directly regulating other waters or sources of pollution. *See United States v. Hanousek*, 176 F.3d 1116 (9th Cir. 1999) (Defendant convicted of CWA violation when upland oil pipeline ruptured, spilled on dry land, and leaked into nearby Skagway River, a navigable water). The simple truth is that the government need not regulate all sources of pollution with a potential "hydrological connection" to "navigable waters" to effectuate the purpose of the Act; to protect the "physical and biological integrity of the Nation's waters." 531 U.S. at 166. The substantial civil and criminal penalties imposed by the Act serve as a deterrent to unauthorized discharges. *See* 33 U.S.C. § 1319.

Also, if Congress can directly regulate anything that could adversely affect what Congress statutorily protects, Congress could extend its powers beyond those enumerated in the Constitution without limit. The danger in this is demonstrated by this case. According to the Sixth Circuit, "A pollutant can contaminate non-navigable water and pollute the navigable-in-fact waters downstream." App. A6. Therefore, the Sixth

Circuit believes, Congress must have intended to regulate nonnavigable waters. But the fallacy in this is that logically the same thing could be said of dry land too: A pollutant can contaminate dry land and pollute the navigable-in-fact waters downstream. *See, e.g., Hanousek*, 176 F.3d 1116.

The Clean Water Act does not purport to regulate dry land any more than it purports to regulate isolated waters, like the wetlands on Mr. Rapanos' property. Congress surely would have been explicit had it intended such broad regulatory authority to address pollution from such sources far removed from any navigable water. As this Court observed in *Solid Waste Agency*, "we find nothing approaching a clear statement from Congress that it intended § 404(a) to reach an abandoned sand and gravel pit such as we have here." *Solid Waste Agency*, 531 U.S. at 174.

III

THE SIXTH CIRCUIT DECISION IN THIS CASE CONFLICTS WITH THE FIFTH CIRCUIT ON A QUESTION OF NATIONAL IMPORTANCE

Since this Court's decision in *Solid Waste Agency*, the government has routinely argued that this Court merely invalidated the "Migratory Bird Rule" and did not prohibit the Corps and EPA from regulating nonnavigable, isolated, intrastate wetlands that do not abut a navigable waterway, such as the wetlands found on Mr. Rapanos' property. *See United States v. Lamplight Equestrian Center, Inc.*, 2002 WL 360652. More precisely, the government has argued, as it did in this case, that the government has § 404(a) jurisdiction over any wetland, or other water, that has any "surface hydrological connection" to a navigable water, even if that water lies miles away.

That position is contrary to this Court's finding in *Solid Waste Agency* that "the text of the statute will not allow" Clean

Water Act jurisdiction over wetlands that are not immediately adjacent to navigable waters. *See Solid Waste Agency*, 531 U.S. at 168. It is no surprise, therefore, that such cases have led to a substantial conflict among the district courts as well as a conflict among the Circuit Courts of Appeal. The Fifth Circuit decisions in *Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001), and *In Re Needham*, WL 22953383 (5th Cir. 2003) conflict with the Sixth Circuit's decision in this case.

In *Rice*, an action was brought against Harken Exploration Company under the Oil Pollution Act (OPA) for oil spills on Rice's property in Hutchinson County, Texas. Among other things, the OPA imposes strict liability on parties responsible for discharging oil into "navigable waters," defined as "waters of the United States." *Id.* at 266-67. The scope of the OPA was an issue of first impression for the Fifth Circuit and required the court to define "navigable waters." *Id.* at 267.

Because there have been few cases construing the OPA definition of "navigable waters," the court turned to the cases interpreting the term "navigable waters" under the Clean Water Act. The Fifth Circuit determined that the legislative history and the use of identical definitions of "navigable waters" in the OPA and the Clean Water Act suggested that Congress intended the term "navigable waters" to "have the same meaning" in both acts. *Id.*

The Fifth Circuit began its analysis with a reference to *Riverside Bayview Homes* in which it noted that this Court had adopted an expansive reading of "navigable waters" which the Fifth Circuit had previously followed in *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983). *Rice v. Harken*, 250 F.3d at 268. But the court concluded its analysis with *Solid Waste Agency,* noting that this Court had more recently "limited the scope of the CWA." *Id.*

The Fifth Circuit observed that in *Solid Waste Agency*, this Court had "distinguished *Riverside Bayview Homes* on the

ground that in that case the wetlands in question were adjacent to a body of open water that was actually navigable" and that the term "navigable waters" had to have some effect. *Id.* Based on its reading of *Solid Waste Agency*, therefore, the Fifth Circuit declined to characterize a small seasonal creek as "waters of the United States" subject to federal regulation under either the Clean Water Act or the OPA, even though the creek flowed intermittently into the Canadian River, a "navigable water." "Instead," the court held, "a body of water is protected under the Act only if it is actually navigable or is adjacent to an open body of navigable water." *Id.* at 270.

More recently, the Fifth Circuit affirmed its holding in *Rice* and expressly rejected the Sixth Circuit's interpretation of Clean Water Act jurisdiction in this case. In *In re Needham*, WL 2295338, the Fifth Circuit was again required to determine the scope of "navigable waters" under the Oil Pollution Act and, as in *Rice*, the Fifth Circuit relied on *Solid Waste Agency* for its determination.

In *In Re Needham*, the government argued that the definition of navigable waters "covers all waters, excluding groundwater, that have any hydrological connection with 'navigable water.'" *Id.* at *3. The Fifth Circuit noted that at least two appellate courts had agreed with this interpretation: *United States v. Deaton*, 332 F.3d 698 ("asserting authority under the CWA, over wetlands that are 'adjacent to, and drain into, a roadside ditch whose waters eventually flow into the navigable Wicomico River and Chesapeake Bay'"); and the Sixth Circuit in this case, App. A10 ("asserting authority, under the CWA, over wetlands that flow into a man-made drain, which in turn flows into a creek, which in turn flows into a navigable river.") *In Re Needham*, WL 22953383 at *3.

But the Fifth Circuit expressly rejected this interpretation, stating that the government's definition of navigable waters "is unsustainable" under *Solid Waste Agency*. *Id.* According to the

court, the CWA and OPA do not permit the federal government to regulate "tributaries," including wetlands, that are neither navigable in fact nor adjacent to such waters. *Id.*

> Consequently, in this circuit the United States may not simply impose regulations over puddles, sewers, roadside ditches and the like; under [*Solid Waste Agency*] "a body of water is subject to regulation . . . if the body of water is actually navigable or adjacent to an open body of navigable water." *In Re Needham*, WL 22953383, *id.* citing *Rice*, 250 F.3d at 269.

The Fifth Circuit court went on to say that the interpretation of "navigable waters" suggested by the government—which the court previously noted had been adopted by the Sixth Circuit in this case—would push "the outer limits of the Commerce Clause and raise serious constitutional questions." *In Re Needham*, WL 22953383 at *5, n.8.

The Fifth Circuit decisions in *Rice* and *In Re Needham* not only conflict with the Sixth Circuit decision in this case, but also with the Fourth Circuit decisions in *Treacy v. Newdunn Associates, LLP*, 344 F.3d 407 (4th Cir. 2003), and *United States v. Deaton*, 332 F.3d 698, both of which are pending before this Court on petitions for writ of certiorari. *See Newdunn v. United States* (Docket No. 03-637) and *Deaton v. United States* (Docket No. 03-701). And, like Mr. Rapanos in this case, both *Newdunn* and *Deaton* raise this conflict and a similar question of whether the government can regulate wetlands that are not immediately adjacent to a navigable water.

IV

THE DECISION BELOW NOT ONLY EXCEEDS THE STATUTORY AUTHORITY OF THE CLEAN WATER ACT, IT ALSO RAISES SERIOUS CONSTITUTIONAL QUESTIONS ABOUT WHICH THIS COURT WARNED IN *SOLID WASTE AGENCY*

In *Solid Waste Agency*, this Court instructed that the word "navigable" must inform the government's interpretation of the jurisdictional reach of the Clean Water Act. Otherwise, "the use of the word navigable in the statute . . . does not have any independent significance." *Solid Waste Agency*, 531 U.S. at 172. According to this Court, "[t]he term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: Its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." *Id.*

Besides the express language in the Act, this Court gave three reasons for limiting Corps' authority to Congress' traditional jurisdiction over navigable waters and refusing to hold, as the government urged, "that isolated ponds, some only seasonal, wholly located within two Illinois counties, fall under § 404(a)'s definition of 'navigable waters' because they serve as habitat for migratory birds." *Id.* at 171-72. First, the regulation of such waters raised serious Commerce Clause problems. Second, it upset the federal-state balance. And third, the regulation of such waters undermined the express objective of the Clean Water Act to protect the ability of the states to control local land and water use.

Thus, any regulation of a wetland that does not satisfy this Court's concerns, cannot be sustained. In this case, the government's assertion of regulatory authority over nonnavigable, isolated, intrastate wetlands raises the same constitutional and statutory problems as the Corps' regulation

of the nonnavigable, isolated, intrastate waters this Court invalidated in *Solid Waste* Agency.

A. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Raises a Serious Question of Congress' Power Under the Commerce Clause

In *Solid Waste Agency*, the Corps argued that the Clean Water Act granted it authority to regulate "nonnavigable, isolated, intrastate" waters. *Id.* at 172. However, the Supreme Court determined that the Corps' interpretation of the statute invoked "the outer limits of Congress' power" and could not be sustained. *Id.*

> Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."

Id. at 173 (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988)).

The constitutional problem was the Corps' claim that the filling of "nonnavigable, isolated, intrastate" waters somehow "substantially affected" interstate commerce and was, therefore, authorized under Congress' commerce power. This Court was clearly skeptical of this argument and noted that the commerce connection asserted by the Corps was "a far cry, indeed, from the 'navigable waters' and 'waters of the United States' to which the statute by its terms extends." *Id.* at 173. To drive the point home, this Court referenced its Commerce Clause decisions in *United States v. Morrison*, 529 U.S. 598 (2000), and *United States v. Lopez*, 514 U.S. 549 (1995), stating: "Twice in the past six years we have reaffirmed the proposition that the grant of authority to Congress under the Commerce

Clause, though broad, is not unlimited." *Solid Waste Agency*, 531 U.S. at 173.

Since the regulation of nonnavigable, isolated, intrastate waters implied unlimited administrative authority in the Corps, well beyond the power of Congress to regulate, this Court was unwilling to read such authority into the Clean Water Act. But the Corps' assertion of authority over all waters with a mere surface connection to a navigable water in this case implies the same limitless power as the "Migratory Bird Rule" and is likewise invalid.

In *Lopez* and *Morrison*, this Court asked: (1) if the statute purports to regulate an economic activity; (2) if the statute has a jurisdictional element establishing through case-by-case analysis a connection to interstate commerce; and (3) if the regulation intrudes on areas of traditional state concern.

Under this framework, the regulation of the filling of nonnavigable, isolated, intrastate wetlands utterly fails as a valid exercise of the Commerce Clause power. First, the filling of such waters is not inherently commercial and, like the mere possession of a gun in *Lopez*, on its face has nothing to do with commerce or any sort of economic activity. Second, the government's regulation has no jurisdictional element establishing through case-by-case analysis a connection to interstate commerce. And, third, the regulation of the filling of nonnavigable, isolated, intrastate wetlands and similar waters intrudes on the sovereign power of the state to control local land and water use.

To avoid the constitutional conflict raised by the government's regulation of nonnavigable, isolated, intrastate wetlands in this case, this Court should grant the writ of certiorari and strictly apply the principles enunciated in *Solid Waste Agency* limiting the scope of the Clean Water Act to navigable waters and wetlands adjacent to such waters.

B. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Upsets the Federal-State Balance

The Corps' regulation of nonnavigable, isolated, intrastate waters in *Solid Waste Agency* raised another red flag in this Court; federal intrusion into state affairs. The concern raised by pushing the envelope on federal authority is heightened, this Court said, "where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Solid Waste Agency*, 531 U.S. at 173. Simply stated, this Court recognized that permitting the Corps to claim federal jurisdiction over ponds and mudflats "would result in a significant impingement of the States' traditional and primary power over land and water use." *Id.* at 174.

This Court did not need to speculate on that point. The Corps' heavy-handed enforcement of § 404(a) of the Clean Water Act is well known. *See, e.g., National Mining Association v. United States Army Corps of Engineers*, 145 F.3d 1399 (D.C. Cir. 1998) (government argued that "incidental fallback" from dredging constitutes fill and that the Corps could require a permit to ride a bicycle across a wetland under its interpretation of § 404."), and *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997) (Wilson sentenced to 21 months in prison, 1 year supervised release and $1 million in fines for filling nonadjacent wetlands that drain to ditches, intermittent streams and creeks. Other defendants fined $3 million and placed on 5 years probation.).

By means of the § 404(a) permit process, the federal government assumes actual veto power over literally tens of thousands of land use projects nationwide every year, thereby usurping the traditional powers of state and local governments. A more significant shift in the federal-state framework would be hard to conceive. By one measure, 75% of the approximately 100,000,000 acres of the nation's wetlands are

on private land subject to state and local control. *See* Jonathan H. Adler, *Wetlands, Waterfowl, and the Menace of Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 26, 52 (1999). Clearly, this Court's concern for federal intrusion into state affairs was justified in *Solid Waste Agency* and is equally justified in this case. If the federal government can regulate nonnavigable, isolated, intrastate wetlands, as it did in this case, or any wetland with a mere hydrological connection to a navigable water, the States will have lost much of their sovereign power. This cannot be the law.

This Court has recognized that the Constitution established a federal government of enumerated powers which are few and defined in contrast to the powers of the States which are numerous and indefinite. *See Lopez*, 514 U.S. at 552. This limitation on federal authority was necessary, this Court has emphasized, to ensure our fundamental liberties and protect the nation against unfettered federal power and a "completely centralized government." *Id.* at 552-55. It follows, therefore, that the federal government cannot shift this balance of power by the simple expedient of asserting regulatory authority over virtually all intrastate wetlands, as it has done in this case.

In *Solid Waste Agency* this Court affirmed the principle that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." 531 U.S. at 172. This principle derives, this Court said, from the "prudential desire not to needlessly reach constitutional issues" and the Court's assumption that Congress does not lightly authorize statutory interpretations that "push the limit of congressional authority" as the Corps had done in *Solid Waste Agency*. *Id.* 172-73. Thus, this Court stated, "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly

contrary to the intent of Congress." *Id.* at 173 (citing *DeBartolo*, 485 U.S. at 575).

C. The Regulation of Nonnavigable, Isolated, Intrastate Wetlands on Mr. Rapanos' Property Undermines an Express Objective of the Clean Water Act to Defer to the Rights of the States

Congress understood the dangers of upsetting the federal-state balance and sought to protect state and local governments from federal overreaching. Indeed, Congress expressly forbade the all-encompassing federal regulation of intrastate waters that is the common practice of the Corps and EPA today and which the Sixth Circuit upheld in the decision below.

An explicit objective of Congress in promulgating the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States . . . to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b). But the regulation of nonnavigable, isolated, intrastate waters at issue in *Solid Waste Agency* was inconsistent with that objective. So is the regulation of nonnavigable, isolated, intrastate wetlands in this case. The ability of the federal government to condition or prohibit the filling of nonadjacent waters cannot coexist with the State's "primary responsibilities and rights . . . to plan the development and use . . . of land and water resources" recognized by Congress in the Clean Water Act. *Id.* The regulation of such waters does not "recognize, preserve, and protect" the power of the States. Rather, it diminishes that power.

Therefore, the government's regulation of the wetlands on Mr. Rapanos' property is not sanctioned by Congress, nor is it supported by the Constitution or the constitutional structure. Therefore, this Court should grant the writ, apply *Solid Waste Agency*, and "read the statute as written to avoid the significant constitutional and federalism questions raised" by this case. *Solid Waste Agency*, 531 U.S. at 174.

CONCLUSION

The criminal conviction of Mr. Rapanos in the Sixth Circuit for placing sand on isolated wetlands that lie approximately twenty miles from the nearest navigable waters defies common sense. It also conflicts with this Court's decision in *Solid Waste Agency* and the Fifth Circuit's decisions in *Rice* and *In Re Needham*. To justify Clean Water Act jurisdiction, those cases require that a wetland abut, and be inseparably bound up with, a navigable water. In addition, federal regulation of Mr. Rapanos' wetlands under the Clean Water Act is inconsistent with the Constitution, the intent of Congress, and established principles of federalism.

This Court should grant the writ of certiorari.

DATED: December, 2003.

Respectfully submitted,

M. REED HOPPER
Counsel of Record
ROBIN L. RIVETT
Pacific Legal Foundation
10360 Old Placerville Road,
Suite 100
Sacramento, California 95827
Telephone: (916) 362-2833
Facsimile: (916) 362-2932

Counsel for Petitioner

Appendix A1

No. 02-1377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	Argued
	)	June 18, 2003
Plaintiff-Appellant,	)	Decided and Filed
	)	Aug. 5, 2003
v.	)	
	)	
JOHN A. RAPANOS,	)	
	)	
Defendant-Appellee.	)	

* * * *

Before: MARTIN, Chief Circuit Judge; NORRIS and ROGERS, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Chief Circuit Judge.

This case arises from the criminal conviction of John Rapanos for unlawfully filling wetlands in Michigan in violation of the Clean Water Act, 33 U.S.C. § 1311(a). After the conviction, an appeal, a denial of *certiorari*, a second appeal, and a grant of *certiorari*, the Supreme Court remanded the case back to us to review in light of *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001). We remanded the case to the district court. The district court found that, in light of *Solid Waste*, Rapanos's land was outside the jurisdiction of the Clean Water Act and the charges were dismissed. The

United States now appeals this decision. For the reasons below, we REVERSE the judgment of the district court and REINSTATE the convictions.

John Rapanos owns a one hundred and seventy-five-acre plot of land in Williams Township, Bay County, Michigan. This plot once contained forested wetlands and cleared meadow areas. During the course of this proceeding, the wetlands in question have been described as between eleven and twenty miles from the nearest navigable-in-fact water. The government argues that there is a significant and direct link between the wetlands on Rapanos's land and this navigable waterway, rendering the wetlands covered by the Clean Water Act. The wetlands are connected to the Labozinski Drain (a one hundred year-old man-made drain) which flows into Hoppler Creek which, in turn, flows into the Kawkawlin River, which is navigable. The Kawkawlin eventually flows into Saginaw Bay and Lake Huron.

At some unstated time, Rapanos decided to sell this plot of land to developers, but in order to make the land more attractive, Rapanos made plans beginning in 1988 to clear the trees from the land and to eradicate the wetlands that were on the property. In December of 1988, Rapanos's attorney approached the Michigan Department of Natural Resources with the development plan. The Department informed him that the land contained wetlands and a permit would be necessary for development to begin on the area, advising that a wetlands consultant be hired to help Rapanos get the permit. Rapanos hired a consultant, who found at least forty-nine and at most fifty-nine acres of wetlands. After receiving the report, Rapanos asked the consultant to destroy any paper evidence of the wetlands on his property and then threatened to fire him and sue if he did not comply. Despite warnings from the Michigan Department of Natural Resources and the United States Environmental Protection Agency, Rapanos began destroying

the wetlands on his property by filling them with earth and sand.

On November 7, 1989, a search warrant was issued, and the executing officers found twenty-nine acres of wetlands on Rapanos's property. In April of 1991, the Michigan Department of Natural Resources asked the United States Environmental Protection Agency to intervene and force compliance from Rapanos. The facts established at trial that Rapanos and his attorney lied in response to the compliance order. Subsequently, Rapanos was charged with knowingly discharging pollutants into the waters of the United States without a permit, a violation of the Clean Water Act. While acknowledging that the wetlands were destroyed, Rapanos argues that the area is not subject to the Clean Water Act because of a lack of federal jurisdiction. He argues the wetlands on his property are not part of the "waters of the United States" as required by the Act. The Act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7).

Rapanos's first trial ended in a mistrial, and the second trial concluded with a guilty verdict. *United States v. Rapanos*, 895 F.Supp. 165, 166 (E.D.Mich.1995). Rapanos then filed a motion for judgment of acquittal and a new trial. The district court denied the motion for judgment of acquittal but granted a new trial. *Id.* at 170. The district court found that, although defense counsel did not object to certain questioning by the prosecution, the court committed plain error by permitting the questioning to proceed. *Id.* at 168. On appeal to this court, we held that the line of questioning was not improper and, therefore, the district court did not commit plain error. We reversed the court's grant of a new trial and remanded for sentencing. *United States v. Rapanos*, 115 F.3d 367, 374 (6th Cir.1997).

The district court sentenced Rapanos to three years of probation and ordered him to pay $185,000. He appealed his conviction, and the United States cross-appealed his sentence. This court affirmed Rapanos's conviction on direct appeal but remanded to the district court for resentencing. *United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000). Rapanos filed a petition for writ of *certiorari*, which the Supreme Court granted. The order granting the writ vacated this court's judgment and remanded the case to us for further consideration in light of *Solid Waste*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576. *Rapanos v. United States*, 533 U.S. 913, 121 S. Ct. 2518, 150 L.Ed.2d 691 (2001). We remanded the case to the district court for consideration in light of *Solid Waste*. *United States v. Rapanos*, 16 Fed.Appx. 345 (6th Cir. 2001). On remand, the district court set aside Rapanos's convictions and dismissed the case, finding that *Solid Waste* had changed the scope of federal jurisdiction under the Clean Water Act. The district court found that because the wetlands on Rapanos's property were not "directly adjacent to navigable waters," the government could not regulate them. *United States v. Rapanos*, 190 F. Supp.2d 1011, 1015-16 (E. D. Mich.2002). The United States appealed this order, which brings this case before us now.

We review the district court's statutory and legal interpretations *de novo*. *United States v. Markwood*, 48 F.3d 969, 975 (6th Cir. 1995). The two questions at issue are whether the district court correctly interpreted the holding of *Solid Waste* and applied it to the facts of this case and whether the original jury instructions were correct in light of *Solid Waste*.

The controversy in *Solid Waste* arose from a group of Chicago suburbs' efforts to find new landfill areas. 531 U.S. at 162-63, 121 S. Ct. 675. They targeted land that had been a sand and gravel mining area from the late 1920's until 1960. *Id.* at

163, 121 S. Ct. 675. Once the mining operation was abandoned, a forest began to take over, and some of the excavation areas collected enough water to become permanent and seasonal ponds. *Id.* When the suburbs wanted to use the land for landfill, the United States Army Corps of Engineers objected to this destruction of "waters of the United States." *Id.* at 164, 121 S. Ct. 675. The non-navigable and isolated ponds were given this designation because the ponds had become the home of migratory birds; the Corps had recently promulgated the "Migratory Bird Rule," which brought waters that were home to migratory birds under federal jurisdiction, based on the principle that "millions of Americans cross state lines and spend over a billion dollars to hunt and observe migratory birds." *Id.* at 166, 121 S. Ct. 675. In *Solid Waste*, however, the Supreme Court rejected that basis for Clean Water Act jurisdiction and ruled that the Migratory Bird Rule exceeded the limitations of the Clean Water Act. *Id.* at 174, 121 S. Ct. 675. The ponds were, therefore, not "waters of the United States," and the group of suburbs was allowed to develop the land without federal interference. *Id.*

The primary question in the case before us is one of jurisdiction. Rapanos claims that *Solid Waste* has redefined the jurisdiction of the Clean Water Act to such a degree that his land is no longer under the Act's protection. We must first turn to the Act itself. The Clean Water Act prohibits the "discharge of any pollutant by any person" except for certain situations enumerated in the Act itself. 33 U.S.C. § 1311(a). One of the exceptions is that a permit must be issued by the Corps of Engineers "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a). "Navigable waters" is in turn defined as "waters of the United States, including territorial seas," 33 U.S.C. § 1362(7), and the Supreme Court has noted that "Congress chose to define waters covered by the Act broadly" in that definition. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121,

133, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985). Although simple in theory, the application of "waters of the United States" has been anything but straightforward.

As common sense makes clear, the Clean Water Act cannot purport to police only the navigable-in-fact waters in the United States in order to keep those waters clean from pollutants. A pollutant can contaminate non-navigable water and pollute the navigable-in-fact waters downstream. Congress acknowledged this reality when it created the Clean Water Act, stating, "Water moves in hydrological cycles and it is essential that discharge of pollutants be controlled at the source." S.Rep. No. 92-414, at 77 (1972), U.S. Code Cong. & Admin. News 3668. As *Solid Waste* makes clear, however, the need to protect the navigable waters from pollution, as the Clean Water Act intends, does not require extending the federal government's jurisdiction over all non-navigable waters.

Wetlands have presented one of the most difficult areas in which to determine the Clean Water Act's exact jurisdictional limitations. Although wetlands are not traditionally navigable-in-fact, they play an important ecological role where they exist. In 40 C.F.R. § 230.3(s), the regulation specifies protection for wetlands that

> affect interstate or foreign commerce . . . [,][w]hich are or could be used by interstate or foreign travelers for recreational or other purposes . . . [,][f]rom which fish or shellfish are or could be taken and sold in interstate or foreign commerce [, and] [w]hich are or could be used for industrial purposes by industries in interstate commerce.

Additionally, the regulation specifies coverage for "[w]etlands adjacent to waters" listed above. *Id.* Essentially, any wetlands

adjacent to waters that are protected by the Clean Water Act are also protected. *Id.*

The Supreme Court first addressed this question of the applicability of the Clean Water Act to wetlands in *Riverside Bayview*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419, a case originally from this circuit. In that case, a landowner wished to develop his wetlands area for a housing development. *Id.* at 124, 106 S. Ct. 455. The wetlands were located in close proximity to Lake St. Clair, Michigan, a navigable-in-fact body of water. *Id.* The Court held that non-navigable wetlands, if adjacent to navigable water, are under the jurisdiction of the Clean Water Act. *Id.* at 131, 106 S. Ct. 455. The Court recognized that the next question before them was whether "the [Corps' definition of wetlands] itself is valid as a construction of the term 'waters of the United States.'" *Id.* The Court noted that "Congress chose to define the waters covered by the Act broadly . . . . [T]he term 'navigable' . . . is of limited import." *Id.* at 133, 106 S. Ct. 455. The Court ultimately held that "a definition of 'waters of the United States' encompassing all wetlands adjacent to other bodies of water over which the Corps has jurisdiction is a permissible interpretation of the Act." *Id.* at 135, 106 S. Ct. 455. In the post-*Riverside* jurisprudence, however, the question remains as to how far the jurisdiction may go and remain a "permissible interpretation."

The Supreme Court's most recent exploration of the extent of Clean Water Act jurisdiction comes in *Solid Waste*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576. In that case, the Court recognized that constitutional limits exist as to how far Congress can extend the Clean Water Act's coverage beyond navigable-in-fact waters. In *Solid Waste*, the water in question was in permanent and seasonal ponds with no hydrological connection to other waterways. *Id.* at 163, 121 S. Ct. 675. The United States claimed federal jurisdiction over the ponds through the "Migratory Bird Rule." 51 Fed.Reg. 41217 (Nov.

13, 1986) (was codified at 33 C.F.R. § 328.3). The Court ruled that the Migratory Bird Rule "exceeds the authority granted to the respondents under § 404(a) of the [Clean Water Act]." *Solid Waste*, 531 U.S. at 174, 121 S. Ct. 675.

Here, Rapanos successfully argued to the district court that *Solid Waste* drastically changed the scope of power granted by the Clean Water Act. In support of his argument, Rapanos turns to Chief Justice Rehnquist's frequent use in the majority opinion of the phrase "wetlands adjacent to water." Rapanos argues that by the use of this phrasing, the Court required that wetlands be *directly* adjacent to navigable water in order for the wetlands to be covered by the Clean Water Act. Although the wetlands were incidentally directly adjacent to navigable-in-fact water in *Riverside*, this interpretation would mark a stark departure from the broad interpretation of the Clean Water Act's scope expressed by the Court in that case. *See Riverside*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419.

Riverside Bayview established that it was a reasonable application of the Clean Water Act to protect wetlands "adjacent to" navigable waterways. 474 U.S. at 135, 106 S. Ct. 455. *Solid Waste* stated that the Migratory Bird Rule was an unreasonable application of the Clean Water Act. 531 U.S. at 174, 121 S. Ct. 675.

This case is closer to *Riverside Bayview* than to *Solid Waste*. In drawing this conclusion, we find persuasive the Fourth Circuit's recent decision in *United States v. Deaton*, 332 F.3d 698 (4th Cir. 2003). In *Deaton*, the defendants were charged under the same statute as Rapanos. *Id.* at 701. In a further similarity, *Deaton* involved wetlands that drain into a ditch which must pass through other waterways to get to navigable-in- fact water, just as is the case on Rapanos's land. *Id.* at 702. The Fourth Circuit analyzed the situation in light of

the Supreme Court's decision in *Solid Waste* and held, *id.* at 709 (citations omitted), that

> [*Solid Waste*], of course, emphasizes that the [Clean Water Act] is based on Congress' power over navigable waters, suggesting that covered non-navigable waters are those with some connection to navigable ones. But we cannot tell from the Act the extent to which nonnavigable tributaries are covered. The statutory term "waters of the United States" is sufficiently ambiguous to constitute an implied delegation of authority to the Corps; this authority permits the Corps to determine which waters are to be covered within the range suggested by [*Solid Waste*].

The court further stated, *id.* at 712 (citations omitted),

> In *Riverside Bayview* the Supreme Court concluded that the Corps regulation extending jurisdiction to adjacent wetlands was a reasonable interpretation in part because of what [*Solid Waste*] described as "the significant nexus between the wetlands and 'navigable waters.'" There is also a nexus between a navigable waterway and its nonnavigable tributaries . . . . This nexus, in light of the "breadth of congressional concern for protection of water quality and aquatic ecosystems," is sufficient to allow the Corps to determine reasonably that its jurisdiction over the whole tributary system of any navigable waterway is warranted. The regulation, as the Corps reads it, reflects a reasonable interpretation of the Clean Water Act. The Act thus reaches to the roadside ditch and its adjacent wetlands.

Because we find the Fourth Circuit's reasoning persuasive, we disagree with the broad interpretation of *Solid Waste* taken by the district court in this case, *Rapanos*, 190 F.Supp.2d at 1016, and, instead, agree with *Deaton*, 332 F.3d 698 at 708-9. Although the *Solid Waste* opinion limits the application of the Clean Water Act, the Court did not go as far as Rapanos argues, restricting the Act's coverage to only wetlands directly abutting navigable water. Instead, the *Solid Waste* Court, in a narrow holding, invalidated the Migratory Bird Rule as exceeding the authority granted to the Army Corps of Engineers by the Clean Water Act, because it found "nothing approaching a clear statement from Congress that it intended [the Act] to reach an abandoned sand and gravel pit." *Solid Waste*, 531 U.S. at 174, 121 S. Ct. 675.

The evidence presented in this case suffices to show that the wetlands on Rapanos's land are adjacent to the Labozinski Drain, especially in view of the hydrological connection between the two. It follows under the analysis in *Deaton*, with which we agree, that the Rapanos wetlands are covered by the Clean Water Act. Any contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters. Therefore, the protection of the wetlands on Rapanos's land is a fair extension of the Clean Water Act. *Solid Waste* requires a "significant nexus between the wetlands and 'navigable waters,'" 531 U.S. at 167, 121 S. Ct. 675, for there to be jurisdiction under the Clean Water Act. Because the wetlands are adjacent to the Drain and there exists a hydrological connection among the wetlands, the Drain, and the Kawkawlin River, we find an ample nexus to establish jurisdiction. *Riverside Bayview*, 474 U.S. at 133, 106 S. Ct. 455.

We now turn to the second question before us, regarding the disputed jury instruction. The instruction reads as follows:

> The term waters of the United States includes waters such as lakes, rivers, streams, including intermittent streams or wetlands. The use, degradation, or destruction of, which could affect interstate or foreign commerce, including any such water from which fish or shellfish are or could be taken and sold in interstate commerce.
>
> The definition of waters of the United States also includes tributaries of the waters . . . just identified, and wetlands adjacent to waters of the United States.

Rapanos did not object to the jury instruction; in fact, he specifically requested them. Our review of the instruction is therefore for plain error. Fed R.Crim. P. 52(b). We have stated in *United States v. Jones*, 108 F.3d 668, 670 (6th Cir.1997) (citations omitted), that

> [O]ur inquiry under Rule 52(b) consists of the following four distinct, though interrelated, analyses: (1) whether an error occurred in the district court; (2) if error occurred, whether the error was plain; (3) if the error was plain, whether the plain error affected substantial rights; and (4) "even if all three factors exist, we must then consider whether to exercise our discretionary power under Rule 52(b), or in other words, we must decide whether the plain error affecting substantial rights seriously affected the fairness, integrity or public reputation of judicial proceedings."

In this case, we need only go so far as the first part of the Rule 52(b) inquiry as set forth in *Jones*. Because the *Solid Waste* holding was limited in the way we have described, there was no error in the jury instructions. *Solid Waste* invalidated the "Migratory Bird Rule" but it did not invalidate the agency's

regulations upon which the jury instruction was based. *See* 33 C.F.R. § 328.3(a)(3).

Moreover, even if the jury instruction could be interpreted to have permitted the jury to find that the wetlands at issue were covered because the "affect commerce" language somehow permits an inference like that rejected in *Solid Waste*, there is no indication that such an error affected substantial rights in this case. There was no evidence of migratory bird activity in Rapanos's wetlands. Therefore, the jury could not have based its decision on impermissible grounds, and Rapanos's substantial rights could not have been affected.

For the foregoing reasons, we REVERSE the decision of the district court and REINSTATE the conviction. 28 U.S.C. § 2106. In light of our previous ruling, the case is hereby REMANDED to the district court for resentencing based on a total offense level of twelve. *See Rapanos*, 235 F.3d at 261.

Appendix B1

No. 93-CR-20023-01

UNITED STATES DISTRICT COURT
E.D. MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	Filed Feb. 21, 2002
Plaintiff,	)	
	)	
v.	)	
	)	
JOHN A. RAPANOS,	)	
	)	
Defendant.	)	

* * * *

OPINION AND ORDER

ZATKOFF, Chief Judge.

I. INTRODUCTION

This matter is before the Court on remand from the United States Supreme Court, and the United States Court of Appeals for the Sixth Circuit. The Court ordered the parties to submit briefs on the following issues: 1) to what extent, if any, is 33 U.S.C. § 1344(a) implicated in this case? 2) is Congress' authority under the relevant provisions of the Clean Water Act involved in this case consistent with the Commerce Clause of the United States Constitution? and 3) what is the import of the remand order from the United States Supreme Court? The parties have fully briefed the Court on these issues. Upon reviewing the briefs, the Court further ordered the parties to brief the Court on the following issue: whether the wetlands on

Defendant's property were directly adjacent to navigable waters? Again, the parties fully briefed the Court. The parties also submitted stipulated exhibits from the trial, and the government submitted a supplemental brief. The Court finds that the parties have adequately set forth the relevant law and facts, and that oral argument would not aid in the disposition of this case on remand. *See* E.D.MICH.L.R. 7.1(e)(2). Accordingly, the Court ORDERS that this case on remand be decided on the briefs submitted. For the reasons stated below, the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property. Therefore, Defendant's conviction is set aside, and this case is DISMISSED.

II. BACKGROUND

This case has been remanded to this Court from the United States Supreme Court and the United States Court of Appeals for the Sixth Circuit for reconsideration in light of the Supreme Court's opinion in *Solid Waste Agency of No. Cook Cty. v. Army Corps of Eng'rs*, 531 U.S. 159, 121 S. Ct. 675, 148 L.Ed.2d 576 (2001). The Court shall provide sufficient background facts in order to decide the remand order from the Supreme Court.

Defendant owns a 175 acre plot of land located in Williams Township, Michigan. Defendant's property is not directly adjacent to a navigable body of water; it is over twenty miles from Saginaw Bay, and it roughly twenty miles from where the Kawkawlin River—the nearest body of navigable water—becomes navigable. That 175 acre plot of land contained wetlands. At no time did the wetlands ever occupy more than one-third of Defendant's land, and usually occupied less. Like Defendant's property itself, the wetlands were not directly adjacent to either the Saginaw Bay or the Kawkawlin River.

Appendix B3

Defendant wanted to sell his property to a developer who planned on developing the property. In order to make the land more enticing, Defendant cleared the heavily wooded plot, and filled the wetlands—which were located entirely within his own property—with sand. He did not have the appropriate permit to do so. Thereafter, the government prosecuted Defendant for filling the wetlands with sand while failing to obtain the proper permit.

Defendant was originally brought to trial in July 1994, but due to scheduling concerns, a new trial was ordered. Defendant's second trial commenced in February 1995, and ended in March with a jury convicting Defendant of two counts of knowingly discharging pollutants into waters of the United States without a permit, in violation of § 301(a) of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter "Clean Water Act" or "CWA"). *See* 33 U.S.C. § 1311(a).

After the trial, upon Defendant's motion, the Court reviewed the course of the trial, and ordered a new trial due to a cross-examination of Defendant by the government regarding Defendant's refusal to allow a search of his property. The Court of Appeals reversed, holding that the Court's order was an abuse of discretion.[1] *See United States v. Rapanos*, 115 F.3d

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[1] Defendant did not allow officials from the Michigan Department of Natural Resources to inspect his property. *See Rapanos*, 115 F.3d at 369. At trial, the government cross-examined Defendant about this refusal. *See id.* After the trial, the Court declared a mistrial because it found that Defendant had a right under the Fourth Amendment to deny such an inspection, and that it was improper for the government to cross-examine him about exercising his right. *See id.* at 371. Over a vigorous dissent, the Sixth Circuit reversed, holding that because Defendant's property was an open field he did not have an expectation of privacy that implicated the Fourth Amendment. *See id.* at 374. Therefore, the cross-examination was

(continued...)

367, 374 (6th Cir.1997). On remand, the Court sentenced Defendant to three years' probation and a fine of $185,000. Defendant appealed his conviction, and the government cross-appealed his sentence. The Court of Appeals held that this Court improperly sentenced Defendant and remanded the case for resentencing, while at the same time summarily dismissing Defendant's appeal. *See United States v. Rapanos*, 235 F.3d 256, 261 (6th Cir. 2000). Defendant sought a writ of certiorari from the United States Supreme Court. The Supreme Court granted the writ, vacated the Court of Appeals' order, and remanded the case to the Court of Appeals, instructing the Court of Appeals to reconsider the case in light of *Solid Waste Agency*. The Court of Appeals remanded the case to this Court. *See United States v. Rapanos*, 16 Fed.Appx. 345 (6th Cir. 2001).

III. ANALYSIS

Defendant was convicted of violating the Clean Water Act. Congress passed the CWA for the purpose of "restor[ing] and maintain[ing] the chemical, physical, and biological integrity of the Nation's waters." *See* 33 U.S.C. § 1251(a). The CWA was enacted because the Federal Water Pollution Control Act, which was passed in 1948, proved to be ineffective. *See Environmental Prot. Agency v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202, 96 S. Ct. 2022, 48 L.Ed.2d 578 (1976). Congress determined that part of the reason the Federal Water Pollution Control Act failed was because it "focused on the tolerable effects rather the preventable causes of water pollution." *Id.* One way Congress chose to curtail the causes of water pollution was by broadly defining the term

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[1] (...continued)
not improper. *See id.* at 374.

"navigable waters." *See United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-34, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985); *see also United States v. Ashland Oil and Transp. Co.*, 504 F.2d 1317, 1325 (6th Cir. 1974). The definition of "navigable waters" is central to this case.

The CWA defines "navigable waters" as "the waters of the United States." 33 U.S.C. § 1362(7). The phrase "navigable waters" is used in the statute that governs this case: § 404 of the CWA, which is codified as 33 U.S.C. § 1344. The CWA makes unlawful "the discharge of any pollutant [including sand, *see* 33 U.S.C. § 1362(6)] by any person," except as in compliance with "section[ ] . . . 404 of this title." 33 U.S.C. § 1311(a). Section 404 provides that a person may discharge fill material into "navigable waters" in order to "bring[ ] an area of . . . navigable waters into a use to which it was not previously subject." 33 U.S.C. § 1344(f)(2). Before a person may do so, however, that person must obtain a permit from the Secretary of the Army, acting through the Army Corps of Engineers.[2] *See* 33 U.S.C. § 1344.

The government argues that the wetlands at issue here fall within the scope of § 404 because they constitute "waters of the United States." Regulations promulgated by the Army Corps of Engineers define "waters of the United States" as including: "All other waters such as . . . wetlands . . . the use, degradation or destruction of which could affect interstate or foreign commerce . . . ." 33 C.F.R. § 328.3. The regulations also consider tributaries of navigable waters and wetlands adjacent to navigable waters as falling within the definition of "waters of the United States." *See* 33 C.F.R. § 328.3(5),(7). The government argues that the wetlands on Defendant's 175 acre property were "waters of the United States" because they

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[2] The Army Corps of Engineers has been charged since 1899 with the protection of the navigable waters of the United States.

constituted a "tributary." The government argues that there was evidence introduced at trial that demonstrates that the wetlands at issue were "hydrologically connected and 'directly adjacent to navigable waters.'"[3]

The government is correct in noting that evidence was introduced at trial supporting its position that the wetlands on Defendant's property were connected to navigable waters and therefore constituted "waters of the United States." That fact, however, was never explicitly found, either by the jury or by this Court, nor was such a finding necessitated by the jury instructions.[4] Instead, the jury instructions allowed the jury to find that the wetlands were completely isolated, yet had some impact on interstate commerce. The jury was instructed: "The term ["]waters of the United States["] includes waters[,] such as lakes, rivers, streams, including intermittent streams or wetlands, the use[,] degradation or destruction of which could affect interstate or foreign commerce." The jury was further instructed that the term "waters" also includes "tributaries of the waters that I've just identified, and wetlands adjacent to

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[3] It is worth noting that the majority opinion in *Solid Waste Agency* repeatedly refers to the wetlands at issue in that case as "isolated," despite the fact that, as the dissent points out, even the most seemingly "isolated" wetlands are in fact both hyrdologically connected, as well as ecologically connected, to navigable waters. *See Solid Waste Agency*, 531 U.S. at 176 n. 2, 121 S. Ct. 675 (Stevens, J., dissenting). The dissent notes that the wetlands in *Solid Waste Agency* are at least ecologically connected. *See id.* Despite this, the majority still refers to the wetlands as isolated, indicating what is likely a significant shift in its CWA jurisprudence. This leads the Court to conclude that even if there is a hydrological connection, Defendant's wetlands may be considered "isolated" for purposes of the CWA.

[4] The jury instructions at issue were proposed by both the government and Defendant.

waters of the United States." Thus, while the jury could have found that the wetlands on Defendant's property were adjacent to a tributary, such a finding was not necessary; indeed, it is possible under these instructions that the jury found the wetlands at issue to be completely "isolated" from any navigable waters, yet still impacted interstate commerce.

These jury instructions present a problem in light of the Supreme Court's order to reconsider this case in light of *Solid Waste Agency*. There, the Supreme Court held that the Army Corps of Engineers lack the statutory authority to regulate wetlands that are completely isolated from any navigable waters. *See Solid Waste Agency*, 531 U.S. at 171, 121 S. Ct. 675 ("[R]espondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over nonnavigable, isolated, intrastate waters. . . ."). Thus, whether Defendant's wetlands had any significant nexus to navigable waters is a critical fact that was left unresolved by the jury in this case. At first glance, it would appear that this Court needs to hold yet another trial in order to resolve whether Defendant's wetlands were directly adjacent to navigable waters.

Upon closer inspection of the government's proposed factual argument, it is clear that the Court does not need to hold another trial. The government argues in its brief on remand that there was evidence at trial that establishes the connection between Defendant's land and navigable water. The government argues that Defendant's wetlands had a "surface hydrological connection" to a ditch dubbed the Labozinski drain, which empties into Hoppler Creek, which eventually winds its way into the Kawkawlin River, which in turn flows into Saginaw Bay. The nearest body of navigable water to Defendant's property is the Kawkawlin River, which has as its head point of navigation the Michigan Central R.R. bridge in Kawkawlin, Michigan, about four miles above its mouth. *See*

Appendix A: Navigable Waters of the United States in Army Engineering District, Detroit, 1981, available at http:// www/dnr.state.mi.us/enforcement/ publicrights.htm. Thus, the nearest body of navigable water to Defendant's property is roughly twenty linear miles away. Upon reviewing these facts, and upon closely reviewing *Solid Waste Agency*, as well as the Supreme Court's decision in *Riverside Bayview Homes*, the Court finds, as a matter of law, that the wetlands on Defendant's property were not adjacent to navigable waters.

The Supreme Court's opinion in *Solid Waste Agency* is not directly on point, though it does establish a mode of analysis for this Court. In that case, plaintiffs, a consortium of cities in suburban Chicago, sought a place to dispose of solid waste. *See Solid Waste Agency*, 531 U.S. at 162-3, 121 S. Ct. 675. They discovered an abandoned sand and gravel mining pit that was located entirely within Illinois. *See id.* at 163, 121 S. Ct. 675. The site was ideal for plaintiffs, however, over time, small ponds developed on the property. *See id.* Defendants, the Army Corps of Engineers, determined that they had jurisdiction over the property, but refused to issue a permit despite plaintiffs' efforts to comply with all of the requirements for such a permit. *See id.* at 164-5, 121 S. Ct. 675. Defendants based their determination of jurisdiction on the fact that migratory birds were spotted at the site. *See id.* at 164, 121 S. Ct. 675.

The plaintiffs brought an action attacking defendants' jurisdiction over the site. *See id.* at 165, 121 S. Ct. 675. The Supreme Court held that defendants lacked jurisdiction. *See id.* In its analysis, the Supreme Court examined the "migratory bird rule," which was a regulation that defendants promulgated pursuant to § 404 of the CWA. Basically, the "migratory bird rule" stated that defendants' jurisdiction extended to all intrastate waters that are or would be used by birds protected either under migratory bird treaties or other birds that cross

state lines. *See id.* at 164, 121 S. Ct. 675, (citing 51 Fed. Reg. 41217). In order to determine the validity of this regulation, the Supreme Court analyzed defendants' statutory authority, and interpreted the same statute that is involved in this case.

To begin its examination of the meaning of § 404 of the CWA, the Supreme Court looked to its decision in *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 106 S. Ct. 455, 88 L.Ed.2d 419 (1985). In *Riverside Bayview Homes*, a developer began to fill in a wetland area, a non-navigable body of water, that was directly adjacent to Black Creek, a navigable body of water.[5] *See id.* at 131, 106 S. Ct. 455. At issue in *Riverside Bayview Homes* was whether a wetland that was immediately adjacent to a body of navigable water could be regulated under § 404 of the CWA, despite the fact that the wetland itself was not navigable. *See id.* at 123, 106 S. Ct. 455. The Supreme Court answered that query in the affirmative, relying on regulations promulgated by the Army Corps of Engineers.

In its opinion in *Riverside Bayview Homes*, the Supreme Court noted the broad definition given "navigable waters" under the CWA, and stated that Congress intended that "at least some waters that would not be deemed navigable under the classic understanding of that term" would be subject to regulation. *Id.* at 133, 106 S. Ct. 455 (citing S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972)). The Supreme Court then examined the regulations promulgated by the Army Corps of Engineers, and noted that the Corps reasoned that the causes of water pollution do not rely on "artificial lines;" rather, because water flows in hydrologic cycles, the regulation of activities that cause water pollution

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[5] Black Creek is a tributary to the Clinton River, which in turn flows into Lake St. Clair. Both the Clinton River and Lake St. Clair are also navigable.

must encompass the entire aquatic system. *See id.* at 134, 106 S. Ct. 455 (citing 42 Fed. Reg. 37128 (1977)). The Supreme Court then quoted the Corps: "'For this reason, the landward limit of Federal jurisdiction under Section 404 must include any adjacent wetlands that form the border of or are in reasonable proximity to other waters of the United States . . . .'" *Id.* at 134, 106 S. Ct. 455 (quoting 42 Fed. Reg. 37128 (1977)). The Supreme Court concluded that this regulation is reasonable in light of the statutory definition.

This Court agrees with the outcome of *Riverside Bayview Homes*. Because the goal of the CWA is to curtail water pollution, the Court agrees with the conclusion that federal jurisdiction must encompass some non-navigable water. Rationally, if a quantity of a toxic chemical was discharged into wetlands that are adjacent to a navigable body of water, such as the wetland in *Riverside Bayview Homes*, that chemical would undoubtedly affect the navigable body of water. An example of that occurred in *Ashland Oil*. There, the defendant discharged 3,200 gallons of oil into a non-navigable tributary, roughly one hundred feet from a creek. *See Ashland Oil*, 504 F.2d at 1319. A short time later, a visible sheen appeared on the creek; in turn, the creek flowed into a navigable river. *See id.* at 1320. Therefore, the Court agrees that it is necessary for the federal government to regulate some non-navigable waters to prevent pollution to navigable waters. *See U.S. v. Krilich*, 152 F.Supp.2d 983, 988 (N. D. Ill. 2001) ("[I]t is still the rule that a nonnavigable (in the traditional sense) wetland *directly adjacent* to a navigable body of water falls within the purview of the CWA . . . .") (emphasis added).

While these cases are informative, they are not binding on this Court because the facts in this case are distinguishable. Defendant's wetlands were not directly adjacent to navigable waters as was the wetland in *Riverside Bayview Homes*, and Defendant's activities did not have the same direct impact on

navigable waters as did the defendant in *Ashland Oil*. These differences are crucial because despite its broad reading of the CWA in *Riverside Bayview Homes*, the Supreme Court concluded in *Solid Waste Agency* that the CWA does have limits. The Supreme Court invalidated the migratory bird rule because the CWA contains the words "navigable waters," which act as a limit on federal jurisdiction. *See Solid Waste Agency*, 531 U.S. at 172, 121 S. Ct. 675.

That analysis applies here, too. The fact remains that § 404 of the CWA uses the words "navigable waters." *See* 33 U.S.C. § 1344. While it is true that the statute does broadly define navigable waters, it is not true that the words "navigable waters" are devoid of any meaning. *See Solid Waste Agency*, 531 U.S. at 172, 121 S. Ct. 675; *see also Riverside Bayview Homes*, 474 U.S. at 133, 106 S. Ct. 455. Indeed, that the statute uses the term "navigable waters" is significant; it has the import of showing this Court what Congress intended as its authority for enacting the CWA: "its traditional jurisdiction over waters that were or had been navigable in fact or which reasonably could be so made." *Solid Waste Agency*, 531 U.S. at 172, 121 S. Ct. 675 (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 407-408, 61 S. Ct. 291, 85 L.Ed. 243 (1940)). In other words, the plain text of the statute mandates that navigable waters must be impacted by Defendant's activities.[6]

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[6] Because the Court finds the meaning of the statutory text to be clear, it need not be concerned with the level of deference that it is to give the agency's interpretation of the statute. *See Chevron U.S.A., Inc. v. Natural Res. Defense Council, Inc.*, 467 U.S. 837, 842-43, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.")

(continued...)

Upon reviewing the government's proposed facts, the Court finds, as a matter of law, that the government is unable to prove that Defendant, whose land contained wetlands that are located roughly twenty miles from the nearest body of navigable water, affected any navigable waters.

IV. CONCLUSION

For the reasons stated above, the Court finds as a matter of law that the wetlands on Defendant's property were not directly adjacent to navigable waters, and therefore, the government cannot regulate Defendant's property. Therefore, Defendant's conviction is set aside, and this case is DISMISSED.

IT IS SO ORDERED.

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[6] (...continued)

Appendix C1

No. 00-1428

SUPREME COURT OF THE UNITED STATES

JOHN A. RAPANOS,

Petitioner,

v.

UNITED STATES,

Respondent.

Filed
June 18, 2001.

* * * *

On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. Petition for writ of certiorari granted. Judgment vacated and case remanded to the United States Court of Appeals for the Sixth Circuit for further consideration in light of *Solid Waste Agency of No. Cook Cty. v. Army Corps of Engineers*, 531 U.S. 159, 121 S. Ct. 675, 148 L. Ed.2d 576 (2001).

Appendix D1

No. 02-1377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	Filed
	)	Sept. 29, 2003
Plaintiff-Appellant,	)	Leonard Green,
	)	Clerk
v.	)	
	)	ORDER
JOHN A. RAPANOS,	)	
	)	
Defendant-Appellee.	)	

BEFORE: MARTIN, Chief Judge; NORRIS and ROGERS, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green, Clerk